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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 93

JACK GALTER, DORA M. GALTER,
WILLIAM R. GALTER and ARNOLD F. SHAPIRO,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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The petitioners, Jack Galter, Dora M. Galter, William R. Galter and Arnold F. Shapiro, respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered March 4, 1951, modifying in some respects, disapproving in some respects, and approving and affirming in some respects a cease and desist order of the Federal Trade Commission issued against petitioners and others on August 14, 1947.

The petitioners, being residents of Chicago, Illinois, and within the Seventh Circuit, invoked the jurisdiction of the United States Circuit Court of Appeals for said Circuit by

filing therein their petition to review said cease and desist order.

On Feb. 5, 1951, said Circuit Court rendered an option by Lindley, District Judge modifying, disapproving and approving said cease and desist order, a copy of which said opinion is set forth in the appendix hereto. On March 4, 1951 said Circuit Court entered its final decree.

Basis for the Jurisdiction of this Court to Review the Judgment in Question.

The jurisdiction of this Court is invoked under Section #1254 of Title 28 U.S.C.A.

Said decree of the Circuit Court is subject to review by this Court upon certiorari, as provided in Section 1254 of Title 28 U.S.C.A.

This petition is filed within the time provided by Section 2101 of Title 28, U.S.C.A.

Summary of Matter Involved.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 4, 1941 issued and served its complaint in this proceeding upon petitioners and others, charging them with unfair methods of competition in interstate commerce (R. 2). After the filing by the petitioners and certain other defendants of their answers to the complaint (R. 24, 33), certain testimony and other evidence in support of and in opposition to the complaint were introduced before a Trial Examiner of the Commission.

Subsequently, and before the introduction of evidence in the proceedings had been completed, certain Stipulations of Fact were entered into between the petitioners and counsel for the Commission, which Stipulations provided

that, *subject to the approval of the Stipulation by the Commission,* the facts set forth therein might be taken as facts in the proceedings and in lieu of testimony in support of or in opposition to the complaint, and that the Commission might proceed upon such Stipulation of Facts and upon the evidence theretofore introduced, to make its report, stating its findings as to the facts (including inferences which it might draw from the stipulated facts and its conclusion based thereon), and enter its order disposing of the proceedings, without the presentation of oral argument or the filing of briefs (R. 47, 56).

Thereafter the proceedings regularly came on for final consideration by the Commission upon the Record, including the complaint, answers, Stipulation of Facts and testimony and other evidence, and the Commission entered its Cease and Desist Order dated August 14, 1947 (R. 158).

Subsequently thereto, the petitioners filed before the Federal Trade Commission a petition and a supplemental petition to set aside the order to cease and desist issued by the Commission in the above entitled cause (R. 162, 167).

On January 6, 1950, the Commission issued its order dismissing the petitioners' petition and supplemental petition to set aside the order to cease and desist and to reopen these proceedings (R. 184).

Petitioners subsequently invoked the jurisdiction of the United States Court of Appeals for the Seventh Circuit by filing therein their petition to review said Cease and Desist Order and on March 4, 1951 said Court of Appeals for the Seventh Circuit entered its final Decree which modified said Cease and Desist Order in part, approved said Cease and Desist Order in part, and disapproved said

Cease and Desist Order in part. A copy of said Decree is set forth in the appendix hereto.

The facts are these:

Certain corporations of which petitioners were officers, and petitioners, were engaged in the manufacture, sale and distribution of various items of novelty merchandise, including electric shavers, cameras, electric clocks, and electric lighters.

The names "Elgin", "Underwood", and "Remington" were used by certain corporations of which petitioners were officers, on some of their products. These names were imprinted upon the products and appeared on the cartons in which the products were packaged and sold to the public.

The use of the name "Elgin" was discontinued sometime in 1939, several years prior to the filing of the complaint in this cause (R. 47).

The petition to set aside the cease and desist order alleged that the corporations of which petitioners were officers had discontinued to use of the name "Remington" prior to the filing of the complaint in this cause (R. 164). This allegation was not denied in the Commission's answer and petitioners therefore state herein as a fact that the use of the name "Remington" had been discontinued prior to the filing of the complaint in this cause.

The use of the name "Underwood" was discontinued by the corporations of which these petitioners were officers, in February 1942.

The corporations of which petitioners were officers are no longer existing entities. Of said corporations,

(a) Match King, Inc., an Illinois corporation, was dissolved on November 26, 1943 as a result of voluntary dissolution proceedings brought by its stockholders, officers and directors (R. 162).

(b) Monarch Manufacturing Company, was a trade name used by Match King, Inc. (R. 163).

(c) American Supercraft Corporation, an Illinois corporation was dissolved on December 16, 1943 as a result of voluntary dissolution proceedings brought by its stockholders, officers and directors (R. 163).

None of said corporations have transacted or engaged in any business whatsoever since the respective dates of dissolution above detailed (R. 163).

The Cease and Desist Order was directed against these corporations (R. 161) and petitioners but the Decree of the Circuit Court of Appeals modified said Cease and Desist Order by removing said corporations from the scope of said Order. The Decree of the Circuit Court of Appeals further modified the Cease and Desist Order by deleting from said Cease and Desist Order those provisions restraining petitioners and the now dissolved corporations from the use of the phrase "candid type cameras" in their advertising.

Hearings in this proceeding were held concurrently by the Federal Trade Commission with those held in a companion proceeding before the Commission entitled "*Paris Bead and Novelty House, Inc. et al.* (Docket 4457), the respondents there being jobbers of the products made by the now dissolved corporations of which petitioners were officers.

The evidence that was taken in the *Paris Bead* case applied equally to the petitioners herein and to the now dissolved corporations, and to the respondents in the *Paris Bead* case; respondents in both cases being notified and being present at all hearings, except as hereinafter set forth.

The Stipulation that was entered into by and between counsel for the petitioners herein and the now dissolved

corporations, and counsel for the Federal Trade Commission provided that *no testimony taken after January 28, 1942 would be binding upon the petitioners here and the now dissolved corporations.* Said Stipulation was not signed by the Paris Bead respondents.

Nevertheless hearings were held in joint docket, *viz.*, the *Paris Bead and Novelty House, Inc., et al.,* Docket 4457, and the *Elgin Razor, et al.,* Docket 4458, subsequent to the date of the filing of the Stipulation on to wit: January 29th and 30th, April 13th and 14th, and June 15th, 1942.

These petitioners and the now dissolved corporations were not present at any of said hearings. The Commission subsequently dismissed the complaint against the respondents in Docket 4457.

Questions Presented.

1. Did the Federal Trade Commission abuse its discretion by issuing its Cease and Desist Order based on the alleged wrongful use of the names "Elgin", "Remington", and "Underwood" by the now dissolved corporations of which these petitioners were officers, when

   (a) The corporations of which these petitioners were officers had ceased using the names "Elgin" and "Remington" prior to the filing of the complaint in this cause; and

   (b) The corporations of which these petitioners were officers ceased using the name "Underwood" from the time the Stipulation of Facts was entered into in February 1942.

2. Did the Federal Trade Commission abuse its discretion by issuing its Cease and Desist Order as to the use of the names "Elgin", "Remington" and "Underwood" and as to the other activities complained of by reason of

the five-year time interval between the date of the last hearing, and the date of the Cease and Desist Order, during which interval petitioners committed none of the acts complained of?

3. Did the Federal Trade Commission violate due process by (a) holding hearings without notice which affected petitioners? (b) failing to disclose to petitioners testimony taken in the companion docket which was favorable to petitioners?

Reasons for Allowance of Writ.

1. The Circuit Court in this case has decided a Federal question in a way probably in conflict with an applicable decision of this Court, to wit:

The decision of the Court of Appeals that:

> "in determining whether the commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the Court is concerned largely, not with the period of time which has elapsed between the cessation and the entry of the order, but with the time from the date of cessation to the date of issuance of the complaint"

appears to be in conflict with the decision of this Court in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417 (1919) which held that the Court is concerned both with the period of time which has elapsed between the cessation and the entry of the order, and with the time from the date of cessation to the date of issuance of the complaint.

2. That the decision of the Court of Appeals in this case holding that it is a matter of discretion with the Commission as to the issuance of a Cease and Desist Order, despite cessation of the complained activities prior to the complaint, appears to be in conflict with the decision of the United States Court of Appeals for the Sixth Circuit

in *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 Fed. (2d) 113, 116, in which that Court held:

> "The Commission is not authorized to issue a Cease and Desist Order as to practices long discontinued and as to which there is no reason to apprehend renewal."

The decision of the Court of Appeals for the Seventh Circuit also appears to be in conflict with the decision of the United States Court of Appeals for the Third Circuit in *John P. Winston* v. *Federal Trade Commission,* 3 Fed. (2d) 961 (1925) where the Court said:

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition, is a question which in the circumstances is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission had filed the complaint *and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing and what it offered to stipulate never to do again, cannot be sustained.*" (Italics ours.)

3. That the United States Court of Appeals for the Seventh Circuit has so far sanctioned the departure from the accepted and usual course of judicial proceedings required by the Federal Trade Commission Act and by the due process requirement of the Constitution of the United States as to call for the exercise of this Court's power of supervision.

The Stipulation of Facts, although signed by counsel for petitioners and counsel for the Commission, had not been approved by the Commission at a time when hearings were held in joint Dockets 4457 and 4458. Petitioners did

not attend any of these hearings and no notice that these hearings would be held after the Stipulation had been signed was given petitioners. The Stipulation not being approved by the Commission, the holding of said hearings before said approval and without notice to the petitioners was a grievous departure from the accepted and usual course of proceedings by the Federal Trade Commission and was a violation of due process.

(a) When the Commission did not give notice of the hearing it was treating the proceeding before it as a class action, and as such the ultimate finding on the question of the names "Elgin", "Remington", and "Underwood" should have been decided the same way in both the *Paris Bead* case, Docket 4457 and petitioner's case, Docket 4458.

(b) The failure of the Trial Examiner to inform the petitioners of the Paris Bead testimony, which was favorable to the position of the petitioners, was in violation of his judicial function much like the duty of the prosecutor to disclose facts to the Court affecting the innocence of the accused in a criminal case.

Wherefore petitioners pray for the issuance of a Writ of Certiorari to said United States Court of Appeals for the Seventh Circuit in conformity with the applicable Acts of Congress and the Rules of the Supreme Court of the United States; and that upon the consideration of this petition, said Writ be allowed.

HENRY H. KOVEN,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION.

Jurisdiction of the Court.

The grounds for the jurisdiction of this Court are set forth in the petition (p. 1).

Erroneous Statement of Facts in Opinion of the United States Court of Appeals for the Seventh Circuit.

In its opinion of February 5, 1951 the Court made certain erroneous statements of fact. We deem it important to call the attention of this Court to some of these erroneous statements:

1. In its opinion (Appendix 4a) the Court said:

> "If these allegations are accepted as true, the result is that the use of two of the three names is not shown to have been discontinued until more than a year after issuance of the complaint. * * *"

Petitioners discontinued the use of the name "Elgin" in 1939 (R. 47). Petition to set aside the Cease and Desist Order alleged that petitioners had discontinued the use of the name "Remington" prior to the filing of the complaint in this cause (R. 164). This allegation was not denied in the Commission's answer. The rule is basic that every allegation not explicitly denied shall be deemed admitted. It is clear, therefore, that whereas the Court of Appeals for the Seventh Circuit stated that two of the three names were not shown to have been discontinued until after the issuance of the complaint, the fact is that the use of two of the three names were discontinued *prior to the issuance of the complaint.*

2. In its opinion the Court of Appeals for the Seventh Circuit states (Appendix 4a):

> "And though petitioners have asserted abandonment of a practice, they still contend in this Court that they have a right to continue it."

There is nothing in the Record, the Briefs, and nothing was said on oral argument to warrant the statement of fact by the Court of Appeals for the Seventh Circuit, that petitioners contend that they have a right to continue to use these names. In fact petitioners have long since abandoned use of these names in the manner as heretofore described, and have no intention whatsoever of resuming their use.

ARGUMENT.

I.

The Court of Appeals for the Seventh Circuit in this case had decided a federal question in a way probably in conflict with an applicable decision of this Court.

The Federal Trade Commission should not issue a Cease and Desist Order against activities voluntarily discontinued well before the issuance of the complaint, where the resumption of the activities is unlikely. The United States Supreme Court has stated the test in the case of *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, at page 445, (1919) where the Court said:

> "Monopoly therefore was not achieved and competition had to be persuaded by pools, associations, trade meetings and through the social form of dinners, all of them it may be, violations of the law, *but* transitory in their purpose and effect. They were scattered through the years from 1901 * * * until 1911, but after instances of success and failure were abandoned *nine months before this suit was brought.* (Italics ours) There is no evidence that the abandonment was in prophecy of or in dread of suit; and the illegal practices have not been renewed, nor is there any indication to resume them, and certainly 'no dangerous probability' of their resumption, the test for which *Swift & Co.* v. *United States,* 196 U. S. 375, at p. 396 is cited."

The essence of the rule that can be drawn from the above case would indicate that where activities have been discontinued prior to the issuance of a complaint, unless there is something akin to a dangerous probability of resumption, the Commission should not issue a Cease and

Desist Order. That the Court of Appeals for the Seventh Circuit should be concerned with the period of time which has elapsed from the date of cessation of the activities complained of, and the date of the entry of the Order, necessarily flows from the dangerous probability doctrine ennunciated by this Court because the length of that time period is a key factor in determining the likelihood of resumption. The Seventh Circuit, however, is not concerned with the dangerous probability of resumption but with the question of whether the activities are surely stopped and they determine the answer to this by examining the period of time from the date of cessation to the date of the complaint. In a case like the one at bar, where five years elapses between the last hearings and the Order to Cease and Desist, *and during that period none of the activities complained of were engaged in,* and where some of the activities have been discontinued prior to the filing of the complaint, the test of the Seventh Circuit is incomplete and in conflict with the test ennunciated by this Court. The Commission says, in all seriousness, that there is nothing in the record to give assurance that petitioners will "surely" not resume use of the name "Elgin", as well as the other trade names, if the Order to Cease and Desist is set aside (Commission's Brief, 12, 13 in the Court of Appeals).

Aside from the death of the individual petitioners, there never would be anything to "surely" give assurance of non-resumption. In this connection, it is important to note that the corporate petitioners all are dissolved and have been since 1943 (R. 162, 163), four years before the Order was entered. The officers of these dissolved corporations are the individual petitioners, *all of whom have long since discontinued all the activities complained of* and the Commission, therefore, should not blind itself

to reality and overlook petitioners' non-use of "Elgin" since 1939, "Remington" since 1941, and "Underwood" since February 7, 1942, even the third of the three names having been discontinued for five years prior to the entry of the Order to Cease and Desist, and the discontinuance of all other activities complained of since 1942.

The Court of Appeals for the Seventh Circuit, in the instant case has, first, erred in its statement of fact that the use of two of the three names was not discontinued until after the issuance of the complaint, when in fact two of the three names were discontinued prior to the issuance of the complaint, but has applied to these facts what we feel to be a misapplication of the doctrine stated in *United States* v. *U. S. Steel Corp., supra,* where the Court felt that equal emphasis should be given to the time prior to the issuance of the complaint the activities were discontinued and whether there is a dangerous probability of their resumption.

The substantial time between the date of the cessation of activities and the date of the entry of the Order to Cease and Desist, during which none of the activities complained of were resumed, all point to the fact that there is no likelihood of resumption of these activities, let alone, a dangerous probability of a resumption of said activities.

It is submitted that the Federal Trade Commission has abused its discretion in this case and that the Court of Appeals was in error in not requiring the Commission to re-open the proceedings in accordance with the petitioners' request, so that testimony might have been heard as to whether there was any dangerous probability or likelihood of renewal of the activities complained of.

The substantial time-lag between the Stipulation of Facts in 1942 and the entry of the Order in 1947, some

five years later, should in itself be grounds for a reversal of part of all of the Cease and Desist Order.

Certainly it cannot be in the public interest to have the Cease and Desist Order issued *in vacuo* against dissolved corporations, as to activities voluntarily discontinued, and against petitioners who have not engaged in said activities for a period of some six years. Cease and Desist Orders carry an air of opprobrium, and, like injunctions, should not be issued where not required.

II.

The decision of the Court of Appeals for the Seventh Circuit in this case, appears to be in conflict with the decisions of the Courts of Appeal for the Third and Sixth Circuits.

The cessation of activities problem can be divided into three parts:

(1) The Court could come to the conclusion that if activities were ceased prior to the issuance of a complaint the Federal Trade Commission should have no discretion as to the issuance of a Cease and Desist Order and that any Cease and Desist Order entered in such circumstances should be subject to reversal;

(2) The Court could come to the conclusion that where activities are discontinued prior to the issuance of the complaint, the Commission should have discretion as to whether or not a Cease and Desist Order should be issued, such discretion, however, to be limited by the "dangerous probability" as to whether such activities would be resumed; and

(3) Where the activities are discontinued prior to the issuance of the complaint, the Commission should have unlimited discretion, with no guiding standard as to whether the Cease and Desist Order should be entered.

The Third and Sixth Circuits appear to be applying the doctrine as enunciated in (2) above, *viz.*, that where the activities complained of are discontinued prior to the issuance of the complaint, that the entry of a Cease and Desist Order, is subject to reversal if there is no likelihood or dangerous probability of a resumption of said activities.

Both Courts emphasize strongly the likelihood of renewal. Thus the Court in the Third Circuit said in the case of *John P. Winston* v. *Federal Trade Commission,* 3 F. (2nd) 961, at p. 962 (1925):

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition, is a question which in the circumstances is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission had filed the complaint and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing and what it offered to stipulate never to do again, cannot be sustained."

And the Court in the Sixth Circuit said in the case of *F. T. C.* v. *Civil Service Training Bureau,* 79 F. (2nd) 113, 116 (1935):

> "The Commission is not authorized to issue a Cease and Desist Order as to practices long discontinued and as to which there is no reason to apprehend renewal."

We have not found any case where the Court held that the Commission should have no discretion whatsoever (which is the possibility outlined in (1) of this Argument

although the *Winston* case may hold this). The Court of Appeals for the Seventh Circuit, however, has adopted the doctrine that the Commission should have unlimited discretion. Thus in the case of *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2nd) 321 (1944) the Court for the Seventh Circuit said at page 330:

> "*Effect of secession of practice condemned by order, before entry of order.* (Court's Italics) Dietzgen Co. contends separately and especially, that the order should not have been entered as to it, because it resigned from S.A.M.A. on March 4, 1938. A petitioner's discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a Cease and Desist order. It has also been so held in the analogous field of the National Labor Relations Act, 29 U.S.C.A., Sec. 151 *et seq.* The propriety of the order to cease and desist and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and profession of desire to respect the law in the future and all other facts. *Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice had been discontinued.* (Italics ours) On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained, occupy no position where they can demand dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission when it comes to entering its order. The object of the proceedings is to stop the unfair practice. *If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been obtained, no order is necessary or should one be entered.* If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appro-

priate. We are not satisfied that the Commission has used that discretion in the instant case."

Here the emphasis is whether the practice has been "surely stopped". That the Court favors giving the Commission unlimited discretion is clearly shown by the following extract from the preceding quotation:

> "On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained, occupy no position where they can demand dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission when it comes to entering its order."

There is nothing in the opinion of the Seventh Circuit in the *Dietzgen* case, *supra,* which gives any clue as to what criteria the Commission should adopt in determining whether the Cease and Desist Order should be entered. What does "surely stopped" mean? If, as in the instant case, the petitioners have discontinued the activities complained of, prior to the complaint, and five years elapse between the last hearing and the Order, it is submitted that the Seventh Circuit has given *carte blanche* authority to the Commission as to the issuance of Cease and Desist Orders in situations like the one in the instant case.

And in *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 F. (2d) 899 (1946) the Seventh Circuit stated as follows:

> "Dennison and Ryburn place great reliance upon their withdrawal from the Association long before the F. T. C.'s investigation ever began. Such withdrawal, while of some persuasive import, does not negative the continued adherence to all the trade practices and zone systems theretofore in existence which resulted in substantially identical delivered prices. We do not

feel theirs are cases of such good cessation of illegal activities as denies the Commission of the power to issue a Cease and Desist Order."

It is true that the Seventh Circuit, in its decisions, says it was concerned with the question as to whether the Commission abused its discretion.

Said concern however can be of little moment because the practical effect of the theory of the Seventh Circuit that they are largely concerned, not with the period of time which has elapsed between the date of the cessation of the activities complained of and the date of the entry of the Order, but with the time from the date of the cessation to the date of issuance of the complaint, is they disregard the dangerous probability doctrine or likelihood of resumption test, and thereby give to the Commission unlimited discretion. This, it is submitted, is both unwise and in conflict with the doctrine of the Third and Sixth Circuit Courts of Appeal.

III.

The United States Court of Appeals for the Seventh Circuit has sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioners of a full hearing as required by Section 5 of the Federal Trade Commission Act and by the due process requirement of the Constitution of the United States so as to call for the exercise of this Court's power of supervision.

(a) The Federal Trade Commission violated due process by holding hearings which affected petitioners, without notice to petitioners. Hearings were held in the companion case, *Paris Bead and Novelty,* subsequent to the signing of the Stipulation on to wit January 29th and 30th, April 13th and 14th and June 15th, 1942, and at such hearings, Respondents in the *Paris Bead and Novelty* case intro-

duced testimony into evidence which clearly rebutted certain vital portions of the Stipulation between the Commission and these petitioners. Said testimony and evidence offered by the Respondent, Paris Bead and Novelty House, Inc., et al., indicated almost indisputably that the names "Elgin", "Remington" and "Underwood" were not *per se* the property of the Elgin Watch Company, Remington Typewriter Company and Underwood Typewriter Company (R. 98ff.) but that such names were in common use and by reason of this, there was little likelihood of confusion resulting from petitioners using said names.

The Stipulation, although signed by counsel for petitioners, and the counsel for the Commission, had not yet been approved by the Commission and it was not so approved until August 5, 1947. Although these hearings had originally been scheduled, petitioners, relying on the Stipulation, believed that no further testimony regarding them would be held at any future hearings that might be held. Consequently they did not attend any of said hearings. The Stipulation, not being approved by the Commission, the holding of said hearings before said approval and without notice to the petitioners, was a clear violation of due process. The cases are legion in their requirement of notice. See Gellhorn, Administrative Law (1947) Chapter 3.

The Commission failed to consider the facts presented at said hearings which rebutted the Stipulation. If the Commission did not intend to give notice of the hearing, then in effect it was treating the proceeding as a class action and as such the same result should have been reached in the *Paris Bead* case as was reached in the instant case. The decision of the Commission in the *Paris Bead* case (see Commission's Brief in the Court of Ap-

peals) dismissing the proceedings against the Paris Bead respondents, stated that it was proceeding on the theory that the respondents in the *Paris Bead* case were jobbers. This, of course, is a "boot strap" type of argument. The Court of Appeals, in its decision in the instant case, argued that there was no denial of due process, saying:

> "* * * for there is, in the record, nothing to indicate that the Commission violated that provision of the stipulation by which it agreed that it would consider only the facts stipulated and the evidence already taken, in disposing of the case, and to argue that the Commission's adherence to its agreement with petitioners constituted a denial of due process to them is to take an obviously untenable position."

This, it is submitted, is reasoning in a circle. One of two things should have been done by the Commission. If it did not consider the evidence that was presented at the Paris Bead hearings then the Stipulation, *not having been approved,* the Commission should have disregarded the Stipulation, treated the proceedings as a class action, and found the same way in both the *Paris Bead* and the instant case. It is submitted that the only way that the due process requirement could have been satisfied, in the instant case, was to have notified the petitioners that evidence favorable to their position had been presented; at that point, the petitioners having been notified, and the Stipulation not having yet been approved by the Commission, the petitioners could have withdrawn from the Stipulation.

(b) The Trial Examiner of the Federal Trade Commission violated his judicial function by failing to inform petitioners of the testimony in the *Paris Bead* case. The question as to what the nature of the duty of the Trial

Examiner in an Administrative Board case is, raises the fundamental problems which underlie the nature of administrative law. A legion of learned articles have been written in which all the pros and cons as to administrative law have been dwelled upon. What the Federal Trade Commission did, in the instant case, however inadvertent, must give a full measure of satisfaction to those who have been severe in their criticism of administrative law.

It is submitted that if a comparable situation occurred in a court of record a judge would have advised petitioners that evidence favorable to their position was being submitted, giving the petitioners the opportunity to withdraw from the unapproved stipulation.

If the object of the Federal Trade Commission is to protect the public and not to engage in controversies with individuals where none is necessary, we feel that the Order to Cease and Desist, in the instant case, was not in the public interest and that, in addition, the conduct of the Commission did not satisfy either the layman's or the lawyer's sense of fair play, and was in violation of the cardinal doctrine of due process.

For the several reasons herein presented, it is deferentially urged that the Writ of Certiorari be allowed.

Respectfully submitted,

HENRY H. KOVEN,
Counsel for Petitioners.